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Supreme Court of the United States.

OCTOBER TERM, 1929, NO. 36.

~~(October Term, 1928, No. 687.)~~

THE CORN EXCHANGE BANK,

Appellant,

—against—

BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

REPLY BRIEF OF APPELLANT.

SPOTSWOOD D. BOWERS,
Counsel for Appellant.

HENRY M. CARPENTER,
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BIRD S. COLER, Commissioner of Public Welfare of the City of New York,

Appellee.

REPLY BRIEF OF APPELLANT.

Statement.

This reply brief was rendered necessary because of the somewhat misleading manner in which the facts are stated in the respondent's brief and the unjustified conclusions of law drawn therefrom.

POINT I.

In answer to statement of the case found on pages 2 to 5 of appellee's brief.

In stating the facts of the case the appellee has drawn largely for his allegations of fact from the affidavit of the alleged wife (R., p. 28), and the affidavit of Christopher J. Dunn, Deputy and Acting Commissioner of

Public Welfare of the City of New York (R., pp. 25, 26), which are annexed to the moving affidavit of Henry M. Carpenter, one of the appellant's attorneys, solely for the purpose of showing that in the Magistrate's Court, also known as the Domestic Relations Court, no process or other notice of any kind whatsoever was ever served upon the defendant or said Raffaele De Stefano (R., pp. 23, 24).

The appellant's motion to dismiss was properly made upon the complaint alone. These affidavits were added not to amplify that motion, and for that purpose they could not be considered by the Court nor could they add to nor detract from the sufficiency of the complaint, but were added merely for the purpose of informing the Court that not only did the statute fail to provide for notice or the complaint allege notice, but that *in fact* no notice was given, to the end that the Court, if it deemed the complaint insufficient, of course without considering such affidavits for the reasons advanced in the notice of motion, could finally dismiss the complaint without affording the plaintiff the usual opportunity to amend which, in this case would be clearly idle, without having to go into the question whether or not a notice not provided for by the statute would be sufficient compliance with the due process clause, which by the way it would not. Otherwise the Court might have permitted the plaintiff to amend the complaint so as to show if he could that notice had in fact been given to the alleged husband. These affidavits are, therefore, wholly irrelevant to the questions presented upon this appeal. As the appellee has departed from the facts alleged in the complaint, it will be necessary to briefly state what the practice in New York is upon a motion addressed to the complaint, such as was made in this case. As we stated in our main brief, the question arises upon a

motion equivalent to a demurrer to the material allegations of the complaint. (New York Civil Practice Act, Sec. 277; N. Y. Rules of Civ. Prac., Rule 106, *infra* appendix, p. 20). In New York State the method of pleading prescribed by the former Code and the present Civil Practice Act—as distinguished from the former of practice in the State and from the practice in many other states—was designed to require the allegation of facts rather than the merely formal and unilluminating "common counts", and the allegations must be in form stated to be made by the party pleading. (N. Y. Civ. Prac. Act, Sec. 276, Sec. 241, *infra* appendix, page 19; *Bush* v. *Prosser,* 11 N. Y. 347; *Conaughty* v. *Nichols,* 42 N. Y. 83; *Adams* v. *Dodge,* 114 Misc. Rep. 565, 567; affirmed without opinion 196 App. Div. 957.) Likewise, under the New York Practice, only the *material* allegations of the complaint need be denied by the defendant and the defendant's failure to deny *immaterial* allegations does not imply their admission. (N. Y. Civ. Prac. Act, Sec. 261, *infra* appendix, page 19; *Linton* v. *Unexcelled Fire Works Co.,* 124 N. Y. 533; *Fry* v. *Bennett,* 5 Sand. 54; *Connoss* v. *Meir,* 2 Ed. Smith 314; *Sands* v. *St. John,* 36 Barb. 24; *Brown* v. *Cody,* 23 App. Div. 210; *Adams* v. *Dodge, supra.*) It is quite clear, therefore, that the only facts admitted by the defendant's motion are the material facts stated to be made by the party pleading, contained in the complaint. Although this seems self-evident to those familiar with New York practice, the appellee, as we have stated, in his statement of the facts has departed from the material allegations of the complaint and has stated the facts as if uncontroverted, contained in the affidavit of the alleged wife, which were only a part of the proceedings in the Magistrate's Court, also called the Domestic Relations Court,

to which the defendant-appellant was not a party and in which neither the defendant nor the alleged absconding husband ever received any notice (R., pp. 28-29). In other words, the appellee is attempting to bolster up the allegations of the complaint with the allegations of the alleged wife in the *ex parte* proceedings in the Magistrate's Court. This would be proper enough if the alleged husband had been afforded any form of notice in those proceedings, and this Court should carefully bear in mind that those allegations of the alleged wife have never been proved as against either this defendant or the alleged husband, nor has either been afforded any opportunity to controvert them. This merely emphasizes our contention that notice to the alleged husband is necessary to make these alleged facts binding as against the appellant or its depositor. We admit the due proof of these facts according to the statute in question, but we do not admit that the statute, by providing as it does for their proof without any notice, is constitutional under the Fourteenth Amendment to the United States Constitution.

The only facts which in any way can be said to be colorably admitted by the defendant are the allegations contained in paragraph numbered "Fourth" of the complaint, which reads as follows:

> "Upon information and belief that Mary De Stefano is the wife of Raffaele De Stefano, and that her child is the issue of said marriage, and that said Raffaele De Stefano abandoned his wife and infant child and absconded from the State of New York" (R., p. 16).

The allegations contained in paragraph numbered "Fifth" of the complaint are in substance that in accordance

with Sections 921 and 922 of the Code of Criminal Procedure upon due proof that said Raffaele De Stefano abandoned his wife and infant child, leaving them in danger of becoming a charge upon the public, and absconded from the State of New York, a warrant of seizure was issued, etc. (R., p. 16), are in no sense the equivalent of an allegation that Raffaele De Stefano did abandon his wife and infant child and did leave them in danger of becoming a charge upon the public, and did abscond from the State of New York, but are merely a statement that such alleged facts were proved in an *ex parte* proceeding in the Magistrate's Court. It is, therefore, not alleged in controvertible form in the complaint, and is therefore not admitted by the defendant that the matrimonial domicile of De Stefano and his alleged wife was ever in the State of New York, or that he ever failed to provide for his wife and infant child, or that they ever were in any danger of becoming a charge upon the public. It is therefore quite possible, as the Court of Appeals of the State of New York admits, that at any time De Stefano might reappear in the State of New York and satisfactorily disprove these facts, whereupon the appellant would, according to the opinion of the Court of Appeals, be again liable to De Stefano for the amount for which it has been held liable to the Commissioner of Public Welfare, the appellee.

As to the allegations contained in paragraph numbered "Fourth" of the complaint, we have stated that these allegations might colorably be said to have been admitted by the motion for judgment on the complaint, but this is only colorably so, and we believe in fact they have not been so admitted. The plaintiff deemed these allegations merely to have been alleged as a "matter

of inducement" (*McGarahan* v. *Sheridan*, 106 App. Div. 532; *Hall* v. *Tyler*, 104 Fed. Rep. 757; 31 Cyc. 102), which allegations, while permissible to make clear the rest of the complaint, are not strictly germane to the cause of action, and are therefore not material allegations which are deemed to be admitted by failure to deny them. This becomes clear when it is considered that the statutes under which the proceeding was brought declare by their own express terms that the plaintiff in this action was already vested with title to the property of De Stefano at the time of the commencement of the action by virtue of the proceedings in the Magistrate's Court beyond any power of the appellant bank to dispute, unless those statutes are unconstitutional. Section 922, which is set forth in full on page 50 of our main brief, provides in part as follows:

> "The officers so applying may seize and take the property, wherever it may be found in the same county; *and are vested with all the rights and title thereto which the person absconding then had.*"

The statute clearly contemplated that the divesting of De Stefano's property was complete before the institution of this action, and we therefore cannot see how the appellant by merely putting the allegations contained in paragraph "Fourth" in issue would constitute any defense, if we assume the statutes to be constitutional.

By way of further confusing the issue, the appellee has cited under the statement of the case Sections 1163 and 1166 of the New York Civil Practice Act on page 2 of its brief. Those sections relate solely to actions for divorce or separation, in which actions it may, by the way, be stated that notice to the defendant is always provided for.

It is stated on page 3 of the appellee's brief that the warrant of seizure was returnable at the next term of the County Court, Bronx County. This statement may be confusing as the statute does not contemplate that it was returnable in the sense that a motion is made returnable, but it provides (Section 922 of the Code of Criminal Procedure, p. 50 of our Main Brief) in part:

> "The officers must immediately make an inventory of the property seized by them and return it, together with their proceedings before the next County Court of the county where they reside, there to be filed."

POINT II.

A.

In answer to appellee's Point I.

On page 6 of the appellee's brief, the appellee states that appellant's contention that it has a right to retain the deposit and make loans thereupon until called upon by its depositor for the payment of an equivalent sum, is inexact, in that the appellant's right is to lend money, but not the money of its depositor, but its own money. It seems to us that this distinction, so far as the rights of the appellant is here concerned, is one without a difference. If the appellant is deprived of the amount of the judgment in this case, it is poorer by that amount and has that much less money available for the purposes for which it was organized. If a bank were deprived of all its deposits, it obviously would have to cease to do business. If it is deprived of one of its deposits, its right to do business is impaired by that amount. Fur-

thermore, the appellant has not only been deprived of the amount of the deposit, but has been subjected to costs and the disbursements of the action without being in any way at fault itself.

On page 7, the respondent states that the appellant was free to make loans, but it is obvious that it was free to make less loans than it was before, being poorer by that amount.

On the bottom of page 7, it is stated that no property of the appellant bank was, or was attempted to be seized by the warrant, but the judgment obtained in favor of the appellee is a personal judgment against the bank, subjecting the bank's property to execution, and, as the Court of Appeals has expressly stated, would not prevent De Stefano from suing the bank for the amount of its indebtedness to him. It therefore cannot be De Stefano's property that is being taken away from the bank, for the bank may still be indebted to him.

On page 9 the appellee argues that the statute, having been in existence prior to the making of the deposit, thereby became a part of the contract between the appellant and its depositor. But the contract was not made with De Stefano as a husband, nor was it made for aught that appears with any knowledge that he had a wife and that he was domiciled with her in the State of New York, or in fact that he was a resident of the State of New York at all at that time. It is a matter of common knowledge that banks have many accounts with non-residents and foreigners.

On page 11 and the subsequent pages, the appellee devotes much learning to the proposition that a husband and father is under a legal obligation to support his wife and child, and it suggests that it would be more in conformity with the decencies of civilization that De

Stefano should support his wife and child, rather than that they be temporarily supported by the State pending an investigation, with notice to De Stefano that he was in fact the husband and had not fulfilled his legal obligation to support his wife and child; but the question here presented is not whether a husband should be compelled to support his wife and child, but whether, without any notice or opportunity to be heard, a person should be adjudged to be a husband and father and adjudged to have failed in his duty to support his wife and child, and a third person, who is merely his debtor, be compelled to pay the debt to the State, to be at once administered for the support of an alleged wife and child without any opportunity for the alleged husband to contest that fact. Respondent has cited Genesis, Mark and Ephasians for the support of this extraordinary proposition. Needless to say, these religious authorities lend no color to such a proposition. but merely voice the doctrine, that, spiritually speaking, husband and wife are one. Even in Biblical days, no man was permitted to be condemned without an opportunity to be heard. (Deuteronomy, Chap. 19, Verses 15 to 19.)

Again on page 12, the appellant unwarrantably assumes that the allegations contained in the affidavit of the alleged wife in the proceedings in the Magistrate's Court are binding upon this appellant and appellee states—as if it were uncontested—that De Stefano abandoned his wife and child, leaving them "without means and in danger of becoming charges upon the public."

On page 13, appellant states that we admit that this happened in the case at bar, citing the complaint therefor, but, as we have already stated, the complaint contains no such allegations, but merely states that such

facts were proved *ex parte* in the Magistrate's Court's proceedings. The argument of the appellant found on page 13 apparently is that because of the primary and essential right of self-preservation, the Government need not support destitute women and children, but may merely, upon a colorable claim that such women and children have absconding husbands, without any notice to such alleged absconding husband for an opportunity to be heard, confiscate not only their property, but may in addition compel a bank where such husband happens to have a bank account to pay over the amount of its indebtedness to the Commissioner of Public Welfare, even though the Court of Appeals admits in its opinion in this case that by reason of lack of notice to the husband of the proceeding he may at any time come in and attack the proceeding, and if successful in showing that he was not an absconding husband compel the bank to pay him an amount equivalent to the amount which the bank had previously paid the Commissioner of Public Welfare.

Furthermore, irrespective of what allegations the appellant is deemed to have admitted, we contend that *it is unconstitutional to compel an innocent third party to assume the burden of defending another's wrong under penalty of losing his property if he does not.* The taking of property which is protected by the Fourteenth Amendment to the Constitution does not have to be a direct taking. The fallacy of the appellee's contention is made apparent if we consider an analogous state of facts: *Would a statute which permitted A, who claimed to have a cause of action against B, a non-resident of the State, upon proof that C was indebted to B, to sue C for the amount C owed B, proving against C that he had a cause of action against B, and compelling C to pay A unless he is able to disprove A's alleged cause of action*

against B be constitutional? We think a mere statement of this query contains its own answer and that such a statute would be clearly an unwarranted deprivation of C's property without due process of law. The results of the statutes in the case at bar are *precisely* the same as the case we have assumed.

B.

Further answering appellee's Point I—Appellant could not have interpleaded De Stefano under the law of the State of New York.

On page 14 of the respondent's brief, it is stated that the appellant could have fully protected itself by interpleading its depositor, De Stefano. Nothing would have been more welcome to the appellant than to have taken such a course, *but appellant under the statutes of New York had no such right* for the allegations of the complaint are that De Stefano absconded from the State of New York on or about Sept. 21, 1923 (R., p. 16, fol. 42), which was over four years before the action was begun, which establishes the fact that he is a non-resident for the purpose of acquiring jurisdiction over him (*Haggart* v. *Morgan*, 1 Selden 422; *Collins* v. *Campfield*, 9 How. Prac. 519). It has been repeatedly held by the decisions of the State of New York that a third party (except possibly a resident of the State temporarily away) to be interpleaded must be *personally served within the State* of New York, and that no substituted service against such a person who is not within the State is permissible (*Devoy* v. *Nelles*, 197 App. Div. 628; *Hanna* v. *Stedman*, 230 N. Y. 326; *Bullowa* v. *Provident Life & Trust Co.*, 125 App. Div. 545; and

also see *N. Y. Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518, 521, 522).

In *Devoy* v. *Nelles, supra*, the Court said at page 629:

> "The action is brought to recover the sum of $5,000 upon the theory of money had and received by the defendant to the use of the plaintiff.
>
> Section 820 of the Code of Civil Procedure requires that notice of the application for an order of interpleader shall be given to the claimant and the adverse party.
>
> The affidavits of service of the notices on the alleged claimants do not state where either of them was served. The obvious purpose of such a notice is to bring the claimant before the Court and give him an opportunity to assert his claim. It has somewhat the effect of a summons and must be served in the same manner as a summons is required to be served.
>
> The affidavit of defendant shows that he wrote to the claimant, treasurer Hugh Montague, addressing him as residing at 127 Autumn Street, Passaic, N. J., and that Montague in making answer to that letter refers to his place of business as at No. 1 Montgomery Street, Jersey City, N. J. The presumption which was conceded upon the argument is that Montague was served in the State of his residence. In our opinion there was not proof of a valid service upon the alleged claimant Clan Na Gael.
>
> The Court cannot acquire jurisdiction by service of the notice on a non-resident outside the State, either by personal service, or by substituted service, and such service is not a compliance with the requirement as to notice of Section 820 of the Code.

In *Bullowa* v. *Provident Life & Trust Co.* (125 App. Div. 545) the Court said (at p. 548): 'The Code requires notice to the party to be brought in and does not leave it to the Court to prescribe what that notice shall be. It necessarily follows that it must be personal notice or the equivalent thereof, and it needs the citation of no authorities to show that the courts of one state cannot obtain jurisdiction over citizens and residents of another state by notice served by mail or served personally without the State. It is also evident that these provisions of the Code of Civil Procedure contemplate that the notice shall be such that the Court may thereby obtain jurisdiction over the party without the service of other process and may thereupon, if the facts warrant it, make the order discharging the original defendant and substituting the new defendant thus brought in on notice. *It would seem, therefore, that this section of the Code of Civil Procedure does not authorize such a substitution of a non-resident unless service is made personally within our own State or the party voluntarily appears and submits to the jurisdiction of the Court.*'

This is a personal action and not one *in rem.* The most recent utterance on that subject is the Court of Appeals in *Hanna* v. *Stedman* (230 N. Y. 326). To the same effect is *Rosenthal* v. *United Transportation Co.* (196 App. Div. 540).

In *Hanna* v. *Stedman* (*supra*) the head note correctly summarizes the opinion as follows: '2. Actions or proceedings *in rem* have for their subject specified property which is within the jurisdiction and control of the Court to which application for relief is made and do not include an action of interpleader wherein the plaintiff sought and obtained a judgment determining to

which one of several conflicting claimants it should pay moneys conceded by it to be due upon a personal claim to some one.'

It follows that so far as Hugh Montague, as treasurer of the Clan Na Gael, is concerned the order must be reversed."

POINT III.

In answer to appellee's Point II.

On page 15 of the appellee's brief, the case of *Windsor* v. *McVeigh*, 93 U. S. 274, 279, is quoted from, the appellee, however, carefully deleting therefrom the most important part of that opinion, which immediately succeeds the portion quoted by him, which we have set forth on pages 26 and 27 of our main brief and which, for emphasis, we here again repeat:

> "That right must be recognized and its exercise allowed before the Court can proceed beyond the seizure to judgment. *The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard* upon the charges. *To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential.* Such notification is usually given by monition, public proclamation, or publication in some other form. *The manner of the notification is immaterial, but the notification itself is indispensable.*"

On page 16 and again on page 17 the appellee again relies upon the affidavit of the alleged wife in the Magistrate's Court's proceedings to sustain his supposedly conceded facts—particularly on page 17 he states that the appellant's depositor resided with his wife and child in the Borough of Bronx. This is nowhere alleged in the complaint and is not conceded by the appellant's motion.

On pages 18 and 19 of the appellee's brief, the appellee again attempts to sustain these statutes on the ground that the State for its own self-preservation may compel husbands to support their wives. We do not question the State's right to compel husbands to support their wives. We merely challenge the right of the State to arbitrarily, without a hearing—for no real hearing is provided for unless ample notice is to be given—taking property from alleged husbands, who may not be in fact husbands, for the support of their alleged wives who may not in fact be in any necessity for such provision, and *a fortiori* we challenge the right to compel a bank to pay over moneys of its own to the Commissioner of Public Welfare on the theory he has a statutory assignment of the debt due to the alleged absconding husband, to whom no notice has been given or provided for, and who may, therefore, recover from the bank, if he shows he does not come within the provisions of the statute in question. Thus the bank may be compelled to make double payment of its debt.

POINT IV.

In answer to appellee's Point III.

Point III of the appellee's brief raises the question of the right of the appellant to challenge the constitutionality of the statute in question, and has been sufficiently answered by Point I of our main brief found at

pages 45 *et seq.*, and we particularly again call the attention of this Court to *Pierce* v. *Society of Sisters*, 268 U. S. 510. In this point, the appellee also again suggests that the appellant should have interpleaded its depositor, and we again state that the appellant, under the laws of New York, was prevented from doing so.

Not only may the appellant bank be subjected to double liability, which is clearly a sufficient property interest to raise the question, but it has already been subjected to a judgment for costs, which in and of itself would give it a right to question the validity of the proceedings which rendered such judgment permissible, including unconstitutionality of the statute in so far as it affected its debt to its depositor (see *Croker* v. *New York Trust Co.*, 245 N. Y. 17).

POINT V.

In answer to appellee's Point IV.

In Point IV of the appellee's brief it is stated that the judgment should be sustained, among other things, for the reasons set forth in the prevailing opinion of the Appellate Term of the Supreme Court of the State of New York. That opinion differs considerably from the opinion of the Court of Appeals. The constitutionality of the statute is sustained in that opinion on the theory, among others, that the mere ancientness of the statute makes it constitutional (R., p. 42). The Court of Appeals on the other hand conceded that it could not sustain the constitutionality of the statute upon its age alone. It is true that the Fourteenth Amendment, as the Court of Appeals says, was itself a historical document, but it

was founded upon a lofty tradition of justice, and not upon isolated and obscure and unjust statutes which were probably unknown and unconsidered by our constitution makers. Just as an isolated and ill-considered decision, no matter how hoary with age, does not establish the common law when it is out of harmony with the rest of our case law (*Russey* v. *N. Y. & M. E. R. R. Co.*, 133 N. Y. 79, 85; *Garland* v. *State of Washington*, 232 U. S. 642; 1 Kent's Com., 13 Ed. 477), so, too, an isolated and unjust statute, no matter how ancient, cannot establish what is due process of law when it is out of keeping with the spirit and tradition which lies back of the due process clause. Our constitution makers certainly did not intend to sanctify every manner and kind of obscure and ancient practice. Would witch burning and trial by ordeal be tolerated as due process of law? Would the summary imprisonment of juries for daring to find a verdict contrary to what the trial Judge deemed to be the weight of the evidence be considered due process of law? Yet, such was the ancient practice in not only England but also in the Colonies (Columbia Law Review, Vol. XXIV, February 1924, No. 2, at p. 112).

Furthermore, in so far as the opinion of the Appellate Term intimates that some form of notice would be given to De Stefano in the proceedings in the Magistrate's Court, the opinion of the Appellate Term has been overruled by the opinion of the Court of Appeals, which concedes that no notice is provided for or can be given under the statute in question.

POINT VI.

The judgment and order of the Court of Appeals of the State of New York, dated the 31st day of December, 1928, in this cause, should be reversed, with costs and disbursements in this Court, the Court of Appeals of the State of New York, the Appellate Term of the Supreme Court of the State of New York, First Department, and in the City Court of the City of New York; and the judgment of the City Court of the City of New York, first entered, bearing date October 18th, 1927, in favor of the Corn Exchange Bank, should be reinstated and affirmed, and this cause remanded to the Clerk of the City Court of the City of New York, with directions to said Clerk and the justices of said Court to take appropriate action to carry out the decree of this Court.

Respectfully submitted,

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HENRY M. CARPENTER,
STEWART W. BOWERS,
Of Counsel.

APPENDIX.

New York Civil Practice Act.

Section 241. PLEADINGS: WHAT TO CONTAIN. Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved.

Section 261. CONTENTS OF ANSWER. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim.

Section 276. CONSTRUCTION OF ALLEGATIONS IN VERIFIED PLEADINGS. The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

Section 277. DEMURRER ABOLISHED: OJECTIONS TO PLEADINGS, HOW TAKEN. The demurrer is abolished. An objection to a pleading in point of law may be taken by motion for judgment as the rules provide.

New York Rules of Civil Practice.

RULE 106. MOTION FOR JUDGMENT: WHEN THE DEFECT APPEARS ON FACE OF COMPLAINT. Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, where it appears on the face thereof:

1. That the Court has not jurisdiction of the person of the defendant.

2. That the Court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties for the same cause.

5. That the complaint does not state facts sufficient to constitute a cause of action.

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM 1929

No. 36

THE CORN EXCHANGE BANK,
Appellant,

against

BIRD S. COLER, Commissioner of Public Welfare of The City of New York,
Appellee.

BRIEF FOR THE APPELLEE.

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Supreme Court of the United States

OCTOBER TERM 1929

No. 36

THE CORN EXCHANGE BANK,
Appellant,

against

BIRD S. COLER, Commissioner of Public Welfare of The City of New York,
Appellee.

ON APPEAL ALLOWED BY THE CHIEF JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLEE.

The opinions delivered in the Courts below are officially reported in:

250 N. Y. 136,
132 Misc. 449.

PRELIMINARY

Unless otherwise indicated all references to statutes in this brief are to the statutes of the State of New York. The opinion of the State Court of Appeals (R. p. 47) and the prevailing opinion of the Appellate Term of the State Supreme Court (R. p. 39) are relied upon as correct statements of the law and the facts in this litigation. It is anticipated that they will be given most careful consideration by this Court. Therefore, they are not extensively quoted in the following pages.

Statement of the Case.

On or about January 5, 1926, one Raffaele De Stefano, then residing (see Civil Practice Act §1166 infra p. 27) in the Borough of The Bronx, City of New York, without justification (Civil Practice Act §1163, infra p. 26) abandoned (Code of Criminal Procedure §899 sd. 1, infra p. 29) his wife, Marie De Stefano (R. p. 28, fol. 77) and their infant child Leo (R. p. 28, fol. 78) and absconded from the State of New York (R. p. 30, fol. 83) leaving them without means (Inferior Criminal Courts Act of The City of New York §74, infra p. 37) and in danger of becoming charges upon the public (Poor Law §2, infra p. 47, Greater New York Charter §683, infra p. 34). At the time of his abandonment of his wife (Inferior Criminal Courts Act of The City of New York §74, infra p. 37) and child (Penal Law, §§481, 482, infra p. 47). De Stefano had an account in the appellant bank (R. p. 30, fol. 83) in the sum of $2,030 (R. pp. 28-29, fols. 78-79).

On or about September 21st, 1926 (R. p. 19, fol. 50). The City of New York (Inferior Criminal Courts Act of The City of New York §74, infra p. 38, Greater New York Charter §§657, 659, 662, infra p. 32), acting through its Deputy and Acting Commissioner of Public Welfare, duly filed a petition (R. pp. 25-27) in a non-criminal proceeding (Code of Criminal Procedure §6, infra p. 28) in the City Magistrates Court, designated (Inferior Criminal Courts Act of The City of New York, §74, infra p. 36) as the Domestic Relations Court (Constitution of the State of New York, Art. VI, §18, infra p. 23), charging that the said Raffaele De Stefano, had, without justification (Civil Practice Act §1163, infra p. 26) abandoned his wife and infant child and absconded from the State of New York (See R. p. 30, fol. 83), leaving them without

means and in danger of becoming charges upon the public (R. p. 26, fol. 70, and see R. p. 28, fol. 78) and praying the issuance, pursuant to sections 921 and 922 of the Code of Criminal Procedure, et seq. (infra p. 29), of a warrant, authorizing the Commissioner of Public Welfare of The City of New York (Greater New York Charter §103, as amended by Laws of 1920, Chap. 79, §2, infra p. 31) to seize the property of the said Raffaele De Stefano, to wit, the sum of $2,030 on deposit (Banking Law §2, infra p. 24) to his credit with the appellant bank, so that the property so seized might be applied (Poor Law §130 as amended by Laws of 1924, Chap. 471, §1, infra p. 48) under the direction and control of the County Court of Bronx County (Code of Criminal Procedure §§39, sd. 9, infra p. 28., and 923, infra p. 30) to the support and maintenance of De Stefano's wife and child (R. pp. 26-27, fols. 72-73).

The warrant of seizure so prayed for was duly (Inferior Criminal Courts Act of The City of New York §72, infra p. 35) issued under the hands and seals of two City Magistrates on September 21st, 1926 (R. pp. 18-19). It was returnable at the next term (Code of Criminal Procedure §922, infra p. 30, Judiciary Law §192, infra p. 47) of the County Court, Bronx County (R. p. 19, fol. 50) and was served on the appellant bank on September 22, 1926 (R. p. 17, fol. 44). The appellant bank refused to deliver (R. p. 17, fol. 44) the amount of the deposit with it, made by the absconding husband and father, De Stefano (R. p. 16, fols. 41-42), to the appellee Commissioner of Public Welfare (R. p. 17, fol. 44), and thereafter this action (Civil Practice Act, §6, infra p. 25) for the recovery of the amount of the said De Stefano's deposit in the appellant bank was duly commenced on June 27, 1927 (R. p. 9, fol. 20). The appellant bank did not answer (Civil Practice Act §260, infra p. 26) the

complaint (R. pp. 14-15) herein, but, admitting all of its material allegations (Civil Practice Act §243, infra p. 26) moved (Civil Practice Act §277, infra p. 26) for its dismissal (R. p. 20, fol. 53) upon the ground, variously expressed (R. p. 61):

> That sections 921-925 of the Code of Criminal Procedure deprived the appellant and its depositor De Stefano and either or both of them, of property without due process of law (R. pp. 18-19).

The appellant's motion was successful at the Special Term of the City Court of the City of New York (R. p. 10) and resulted in a judgment dismissing the complaint (R. pp. 11-12). From this judgment the appellee duly (Civil Practice Act §267) appealed (R. p. 10) to the Appellate Term of the Supreme Court of the State of New York, First Judicial Department, which reversed the judgment of the City Court of the City of New York and directed judgment for the appellee for the amount (R. p. 17, fol. 45) claimed in the complaint herein with costs (R. p. 33, fol. 93). From the judgment in the total sum of $2,211.50 thereafter duly entered in the office of the Clerk of the City Court of the City of New York on October 3, 1928 (R. pp. 4-5), the appellant appealed (Civil Practice Act §588, sd. 3), on October 23, 1928, to the Court of Appeals of the State of New York (R. pp. 4-5), which, on December 31, 1928, affirmed the judgment so brought before it and remitted the case to the City Court of The City of New York (R. p. 1) where judgment of affirmance and for costs was duly entered on January 22, 1929 (R. pp. 58-59). An appeal to this Court was allowed (General Rule 36) by the Chief Judge of the Court of Appeals of the State of New York on January 18, 1929 (R. pp. 56-57).

The appellant's assignments of error are in substance:

(1) The complaint (R. pp. 16-17) herein does not state facts sufficient to constitute a cause of action (R. p. 20, fol. 54) because sections 921 and 922 of the Code of Criminal Procedure conflict with the 14th amendment to the Constitution of the State of New York, in that they deprive the appellant and its depositor De Stefano of its, his or their property without due process of law (R. p. 55);

(2) That the appellee had no legal capacity to sue and the Court in which this action was commenced was without jurisdiction of the subject matter thereof (R. p. 21, fol. 57) because sections 921 and 922 of the Code of Criminal Procedure conflict with the 14th Amendment to the Constitution of the United States in that they deprive the appellant and its depositor De Stefano of its, his or their property without due process of law (R. p. 56).

The appellant's definite statement of the points upon which it intends to rely (R. p. 61), like its specifications of error (Appellant's Brief, pp. 5-6), restate, in other language, its asssignments of error (R. pp. 55-56), but add a further contention that the appellant's property right in the fund in controversy, viz, the amount on deposit with it to the credit of the absconding (R. p. 30, fol. 83) husband and father (R. p. 28, fol. 78) is sufficient to enable it to urge in this Court that sections 921-925 of the Code of Criminal Procedure are unconstitutional as they affect it and its depositor, De Stefano (R. p. 62).

POINT I.

The appellant was not deprived of any property without due process of law.

The only right which the appellant claims to have with regard to the deposit with it of $2,030 by the absconding husband and father, De Stefano (R. p. 14, fols. 41-42) is

> "a right to retain the deposit and to make loans thereon until called upon by the depositor for the payment of an equivalent sum" (Appellant's Brief, p. 46).

The appellant's position is inexact. Its relationship with the absconding De Stefano was that of debtor and creditor (Appellant's Brief, p. 46). The contract which it made, when it opened an account with him, was

> "to receive his deposits and honor his checks upon presentation."
>
> 1, Bolles, Modern Law of Banking, Chapter XVI, §1, Chapter XIII, §2.
>
> 7 C. J. p. 672 §381, p. 679 §402.

To lend money is one of the general powers (Banking Law §106, infra p. 24) of the appellant, but the money which it lends is its own money (Appellant's Brief, p. 46), not that of its depositors.

> *New York County National Bank* v. *Massey*, 192 U. S. 138, 145;
>
> *Gardner* v. *Chicago Title & Trust Co.*, 261 U. S. 453, 456.

The warrant (R. pp. 18-19), whose dishonor by the appellant (R. p. 17, fol. 44), was the cause of this litigation (R. p. 17, fol. 44), did not distrain the funds of the appellant bank; it merely seized the "personal property" (Code of Criminal Procedure §921, infra p. 29) of the absconder, De Stefano (R. p. 16, fol. 42; p. 18, fol. 48), which, as the appellant admits (Appellant's Brief, p. 46), was the sum of $2030 (R. p. 16, fol. 41, Civil Practice Act §243, infra p. 26) that it owed (Appellant's Brief, p. 33) to the absconding De Stefano, who, more than 18 months after his abandonment of his wife and infant (R. p. 28, fol. 77), disclosed his whereabouts, as Cairo, Egypt (R. p. 30, fol. 83).

The warrant did not, in any sense, abridge or impair the right of the appellant to conduct or continue its banking business. It was as free to make loans (Appellant's Brief, p. 46) after the service (R. p. 17, fol. 44) of the warrant (R. p. 18) herein, as it was before.

That the debt of $2030 (R. p. 16, fol. 41) owing (Appellant's Brief, p. 33) from the appellant to its depositor De Stefano (R. p. 30, fol. 83) was property within the State of New York (R. pp. 28-29, fols. 78-79; p. 30, fol. 83), and subject to the jurisdiction of its Courts, is incontestable.

> *Omaha National Bank* v. *Federal Reserve Bank,* 26 F. 2d. 884, 888, certiorari denied 278 U. S. 615;
>
> *DeGanay* v. *Lederer,* 250 U. S. 376, 381-382;
>
> *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271.

No property of the appellant Bank was, or was attempted to be, seized by the warrant. Notice to the appellant of the application (R. p. 18, fol. 47) to the

two City Magistrates for the warrant of seizure which they issued (R. p. 19, fols. 50-51) would serve no purpose of interest to it. There was no issue which the appellant could, possibly, raise, either before or after the return of the warrant, except as to whether or not Marie De Stefano and Leo De Stefano (R. p. 28, fols. 77-78) were respectively the wife and child of the appellant's depositor De Stefano (Opinion below, R. p. 52).

If the appellant was not indebted to the absconder De Stefano, there was nothing for the appellee to

> "seize and take ' * * * * * and return * * * to the next county court * * * * *,' " (Code of Criminal Procedure §922 intra p. 30).

If the amount of its indebtedness to De Stefano (Appellant's Brief, p. 33) was less than that specified in the warrant (R. p. 19, fol. 49), the statute (Code of Criminal Procedure §921, infra p. 29) did not authorize the seizure of anything in excess of

> "the property of the person so absconding." (Code of Criminal Procedure §921 infra p. 30).

Altogether, nothing was involved in the seizure, which gave the appellant, a mere debtor (*People* v. *Mechanics & Traders Savings Inst.*, 92 N. Y. 7, 9), of De Stefano (R. p. 16, fol. 41, *supra* p. 6), any shadow of right to question the authority of the two City Magistrates to issue the warrant in controversy, to challenge the validity of the warrant itself, or to be heard with regard to the circumstances of the case upon its return to the County Court of Bronx County (R. p. 19, fol. 50, Code of Criminal Procedure §923, infra p. 30) upon any other question than that of De Stefano's marriage and parenthood.

The statute (Code of Criminal Procedure, §921, infra p. 29) under which the appellee procured the warrant of seizure herein, having been

> "in force long before the absconding husband made his deposit in the defendant bank and long before his marriage." (Opinion below, R. p. 51.)

was as much a part of the contract between the appellant and its depositor De Stefano as any other of its terms,

> *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 189;
>
> *Penney* v. *Nelson,* 183 U. S. 144, 147;
>
> *McCullough* v. *Virginia,* 172 U. S. 102, 116;
>
> *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242, 249;
>
> *St. Paul Fire & Marine Ins. Co.* v. *Eldrasher,* 33 F. 2d. 675, 682,

and in the event of action thereunder by the appellee (Code of Criminal Procedure §914, infra p. 29, Greater New York Charter, §657, infra p. 32) the only things open to challenge by the appellant were, as above stated, the marriage and parenthood of its absconding depositor. But, upon the return of the warrant to the next County Court, of whose sitting the appellant was chargeable with notice (Judiciary Law §192, infra p. 47, Greater New York Charter §1528, infra p. 35), these were things which, with all other matters affecting the merits, had to be judicially determined before the warrant could be confirmed.

As used in Section 923 of the Code of Criminal Procedure (infra p. 30), the words

> "The court, upon inquiring into the circumstances of the case,"

import an independent

> "judicial investigation of the questions of fact"
>
> *Matter of Gill,* 95 App. Div. 174, 175,

in which the appellee was bound

> "to produce some evidence to establish the case charged in the warrant."
>
> *People* v. *Overseers of the Poor of Triangle,* 23 Barb. 236, 239,

and wherein the defendant De Stefano (R. p. 25, fol. 67) had the protected right

> "to appear and defend in person and with counsel * * * "
>
> Constitution of the State of New York Art I §6, infra p. 23.
>
> *People ex rel. McDonald* v. *Keeler,* 99 N. Y. 463, 484.

Indeed "the rights and title" (Code of Criminal Procedure §922, infra p. 30) of the appellee to De Stefano's deposit with the appellant bank, were not only defeasable by failure of confirmation of the warrant by the County Court (Code of Criminal Procedure §923, infra p. 30), but also by De Stefano himself (Code of Criminal Procedure, §924, infra p. 30), not only before, but, at any time after the confirmation of the warrant.

The only object which the statutes assailed by the appellant served was that of forestalling the substantial charges (Greater New York Charter, §§662, 664, infra p. 32, Code of Criminal Procedure §887, infra p. 28)

upon the revenues of the City of New York which would accrue if the appellee had failed to make

> "an investigation into the circumstances" (Greater New York Charter §662, infra, p. 32).

of the destitute wife and child (R. p. 28, fol. 78) who were abandoned by the appellant's depositor, De Stefano.

> *People* v. *Spear*, 133 Misc. 141, 142;

leave to appeal to the Court of Appeals denied by that Court, New York Law Journal, December 8, 1928, p. 1167.

In the State of New York, the obligation of a husband and father to support his wife and child is legal, primary and inescapable.

> *Wetmore* v. *Markoe*, 196 U. S. 68, 73, 75;
>
> *De Brauwere* v. *De Brauwere*, 203 N. Y. 460, 464;
>
> *Laumeier* v. *Laumeier*, 237 N. Y. 357, 364;
>
> *Zwingman* v. *Zwingman*, 150 App. Div. 358, 360.

It might not be calamitous for the State to be required temporarily to support the destitute wife and child of the absconding (R. p. 30, fol. 83) De Stefano (R. p. 28, fol. 78), as the appellant suggests (Appellant's Brief, p. 42). But, on the other hand, it would be no more calamitous, and certainly more in conformity with the decencies of civilization and his obligations as a husband and a father, if De Stefano were to do that himself.

> Genesis 2: 24
>
> Mark 10: 8
>
> Ephesians 5: 25-33

Sohm—Institutes of Roman Law, §§48, 49, 94, 95.

2 Pothier on Obligations 27.

1 Blackstone—Commentaries 442, 447.

2 Kent—Commentaries 146.

Pomeroy—Municipal Law §§742, 749.

1 Bishop—Marriage, Divorce and Separation §§1184, 1202.

30 C. J. 516-518 §29.

The statute (§921, infra p. 29) under which the warrant (R. p. 18) in controversy was issued and that upon which its confirmation depended (§923, infra p. 30) had no other aim than the support of the wife and child (§924, infra p. 30) whom the appellant's depositor (R. p. 30, fol. 83) abandoned (R. p. 28, fol. 78). Such support out of the bank account (R. p. 30, fol. 83) which the appellee seized (R. p. 18) on September 22, 1926 (R. p. 17, fol. 44) could be as temporary as the absconder (R. p. 16, fol. 42) De Stefano, was interested to make it (§924, infra p. 30). Neither the State of New York (Constitution of New York, Art. VII, §1, infra, p. 24) nor the City of New York (Constitution of New York, Art. XII, §1, infra p. 24) is an eleemosynary institution, and no person may be said to have any natural or other right to go therefrom to Cairo, Egypt (R. p. 30, fol. 83), for instance, leaving a wife or child in the City of New York,

> "without means and in danger of becoming charges upon the public" (R. p. 28, fol. 78).

Immediately upon the happening of such an event, and

the appellant admits (Civil Practice Act, §243, infra, p. 26) that it did happen in the case at bar (R. p. 16), fols. 41-42).

> "the primary and essential right of self preservation; which, so long as human governments endure * * * cannot be denied,"
>
> *Gitlow* v. *New York,* 268 U. S. 652, 668;
>
> *Williams* v. *Turner,* 194 U. S. 279, 294;
>
> *Del Ponte* v. *Societa Italiana Di Marconi,* 27 R. I. 1, 70 L. R. A. 188, 191;
>
> *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 363,

required the appellee to take the steps which he did take (R. p. 25) not because of any sympathy (Appellant's Brief, p. 16) for a destitute wife and child (R. p. 28, fol. 78), but in the faithful discharge of his duty (Constitution of New York, Art. XIII, §1, infra, p. 24) to prevent the public moneys of the City of New York from being applied to the maintenance of the family of a person, himself able to support them (Greater New York Charter §683, infra p. 34).

By its failure to comply with the requirements of the warrant (R. p. 18), served upon it on September 22, 1926 (R. p. 18, fol. 44), the appellant did more for its absconding depositor than he could do for himself.

This action predicated upon the warrant was not commenced until June 27, 1927 (R. p. 3, fol. 2). With the commencement of this action, any claim, however tenuous, that, by the proceedings of the appellee before the Magistrate, the appellant was deprived of its property without due process of law (R. p. 21, fol. 55) vanished. If it so pleased, the appellant was then in a position to require the appellee to prove by competent,

relevant and material evidence each and every allegation of the complaint (R. p. 16) herein, which it did not care to admit, and by proof, adduced on its own behalf, to establish, e. g., that the conduct (In re *West*, 108 Fed. 940, 941) of its depositor De Stefano (R. p. 30, fol. 83) did not justify any conclusion that he had abandoned his wife and child (R. p. 16, fols. 41-42), and/or that Mary De Stefano was not the wife (R. p. 16, fol. 41) nor Leo De Stefano the child (R. p. 28, fol. 78) of the appellant's depositor. For these purposes all the liberal facilities provided by Article 29 of the New York Civil Practice Act were open to it. When, on September 21st, 1927 (R. p. 30, fol. 83) the appellant received a demand from its depositor De Stefano for almost the entire amount of the seized deposit (R. p. 17, fol. 44) it could have interpleaded (Banking Law, §113, infra, p. 25) or impleaded (Civil Practice Act, §287, infra p. 26) him, and relieved itself, entirely, of any burden in this action. Nothing prevented it from doing either or both of these things immediately upon the commencement of this action.

The appellant, for reasons satisfactory to itself, preferred, however, to ignore the remedies which the statutes of the State of New York, provided for its protection, and to admit (Civil Practice Act, §243, infra p. 26) each and every material allegation of the complaint herein. By so doing it took any facts which might tend to defeat or invalidate the warrant (R. p. 18) involved herein, so far as it had any proper concern therewith, out of the realm of controversy (Opinion below R. p. 54).

That the Courts of the State of New York resolved this action against it, furnished the appellant with no grievance.

POINT II.

The appellant's depositor, DeStefano, was not deprived of his property without due process of law.

In *Windsor* v. *McVeigh*, 93 U. S. 274, 279, this Court said:

> "The seizure in a suit in rem only brings the property seized within the custody of the Court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by its agent, and that its seizure will, therefore, operate to impart notice to him. When notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed."

See also to the same effect:

The Mary, 9 Cr. 126, 144.

Miller v. *Lautenberg*, 239 N. Y. 132, 136;

Zimmerman Coal Co. v. *Coal Trading Ass'n of Rotterdam*, 30 F. 2d. 933, 934;

The Ann, 8 Fed. 923, 927.

The application to the Magistrates by the City of New York (R. p. 25) for a warrant of seizure of the property of the appellant's depositor, De Stefano (R. p. 26, fol. 71), pursuant to Section 921 of the Code of Criminal Procedure (infra, p. 29) was nothing if not the institution of a proceeding in rem, justiciable in the County Court (Code of Criminal Procedure, §923, infra p. 30). Its highest purpose was to compel the appellant's depositor to

> "return and support" (Code of Criminal Procedure §924, infra p. 30).

the wife and child he had abandoned (R. p. 28, fol. 78)

> "or give security" (Code of Criminal Procedure §924, infra p. 30).

that they

> "shall not be chargeable to the county" (id).

The statutes under which the appellee proceeded in the case at bar did not deny or attempt to deny the appellant's depositor, DeStefano, a hearing (see *Zimmerman Coal Co.* v. *Coal Trading Ass'n of Rotterdam*, 30 F. 2d. 932, 924) or refuse him the right to appear (*Windsor* v. *McVeigh*, 93 U. S. 274, 276, 284). They did not even place a limit of time (see Code of Criminal Procedure §924, infra p. 30) upon his constitutionally protected right

> "to appear and defend in person and with counsel * * * " (Constitution of the State of New York, Art. I, §6, infra p. 23).

and, upon proper proof or assurance to receive back the property which was seized for the purpose of applying it to the maintenance of the child and wife (Code of Criminal Procedure, §923, infra p. 30) he had abandoned (R. p. 28, fols. 77-78).

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States * * * "
>
> *In re Burrus*, 136 U. S. 586, 593-4;
>
> *Simms* v. *Simms*, 175 U. S. 162, 167;
>
> *Popovici* v. *Popovici*, 30 F. 2d. 185;
>
> *Ditson* v. *Ditson*, 4 R. I. 87.

From the mere fact of the residence (Civil Practice Act §1166, infra p. 27) of the appellant's depositor with his wife and child in the Borough of Bronx (R. p. 28, fol. 77) the Court below was entirely justified in holding (R. p. 51), that the legislation which the appellant challenges

> "was as much an incident of the family relation as dower or curtesy or any other marital right."
>
> See 19 C. J. 433 §69.

In the case at bar, except for the additional fact that the public, through its authorized representative is the seeker for relief,

> "It must be borne in mind that the object of the proceeding is to enforce a duty which the husband owes to his family,* * * by proceeding against his property after the defendant puts it beyond the power * * * " (*Rhoades* v. *Rhodes* 78 Neb. 495, 111 N. W. 122, 125).

of his wife and child to receive from him personally the support and maintenance to which they are entitled.

Under the statutes in question the seized property of the appellant's depositor, De Stefano, did little more than stand as bail (*In re Mitchell,* 278 Fed. 707, 709; *Bryan* v. *Bernheimer,* 181 U. S. 188, 196) for his satisfaction of his continuing duty to support and maintain his wife and child and keep them from becoming charges upon the public revenues.

There is nothing in the Constitution of the United States which prevents the States from defending themselves against the diversion or diminution of their public revenues because husbands may, as the appellant's depositor De Stefano did (R. p. 28, fols. 77-78), abandon their wives and children to the undemandable charity

of municipalities; and the Federal Constitution prescribes no limitation upon the means which the several States may adopt to protect themselves against such deserters.

For the purposes of description, the title of the appellee to the bank deposit of the absconder De Stefano may be likened to a common law lien (*Peck* v. *Jenness*, 7 How. 612, 620), and the warrant (R. p. 18), under which the appellee seized may well be likened to the ancient "distringas" (1 Bouvier, Law Dictionary, p. 590, Black, Law Dictionary, p. 280) or "distress" (18 C. J. 1289-1290, 1 Bouvier, Law Dictionary, p. 586, Black, Law Dictionary, p. 378). But these comparisons and illustrations are not as illuminating for the purpose of comprehending the nature of the process by which the appellee was authorized to assume possession and a qualified title to De Stefano's property, as the *"legis actio per pignoris capionem"* (see 2 Bouvier, Law Dictionary, p. 671; Black, Law Dictionary, p. 898) handed down to us from Roman antiquity (Sohm, Institutes of Roman Law, §48, pp. 236-238, §49, note 13, p. 251), which still endures, in the Federal system of jurisprudence, in the distress warrant issuable by executive authorities against certain delinquent officers and their sureties (U. S. Code, title 31, §§506-511).

In effect, the statutes whose validity the appellant contests are addressed to the same object as section 201 of the War Risk Insurance Act (40 Stats. L. 402, 610) under which the enlisted personnel of our military forces during the World War had deducted from their pay fixed sums for the support of their wives and children, without regard to their personal wishes in the matter.

The legislation which the appellant challenges has no conflict with the Tenth Amendment to the Constitution of the United States and is not forbidden by the

Constitution of the State of New York. The obvious end which it served was the preservation of the State and its lesser municipalities. That it was obliged to use force for that high purpose does not make its act unconstitutional, because of any provision of the Fourteenth Amendment.

Martin v. *Hunter's Lessee,* 1 Wheat. 304, 363;

Williams v. *Turner,* 194 U. S. 279, 294;

Gitlow v. *New York,* 268 U. S. 652, 658;

Del Ponte v. *Societa Italiana Di Marconi,* 27 R. I. 1, 70 L. R. A. 188, 191.

POINT III.

The appellant may not question the constitutionality of sections 921-925 of the Code of Criminal Procedure.

All that the appellant had to do to protect itself to the utmost in this litigation, was to pay the fund into Court and interplead its depositor, De Stefano as provided in section 287 of the Civil Practice Act (infra p. 26) or, in the alternative, proceed in the litigation as provided for in Section 113 of the Banking Law (infra p. 25) retaining the fund as therein provided, and interpleading the absconding husband, De Stefano. That would conclude its relation to the litigation. It has no third party interest in the fund sufficient to entitle it to put in issue the question of constitutionality of the Statute. The appellant has no interest in the fund to safeguard that could not have been fully protected by interpleading the absconding husband as above indicated. It was its duty under the law so to proceed, and it has no *right* upon which to base an attack upon the constitutionality of the Statute. It is indeed strange that the appellant did not rely upon the usual presumption of the constitutionality of sections 921 to 925 of the Code of Criminal Procedure (infra pp. 29-31) and make the very common and obvious motion to interplead the depositor De Stefano in the action against it. Instead, the appellant took upon itself the task, on behalf of its depositor, of attacking the constitutionality of the aforesaid provisions of the Code of Criminal Procedure.

Expressly on the point that the appellant is not "affected unfavorably" by the warrant of seizure to the extent necessary to enable it to put in issue the question of constitutionality of the statute, see

Roberts & Schaefer v. *Emerson*, 271 U. S. 50 at pp. 54, 55,

referred to (R. p. 45, fol. 19) in the prevailing opinion at the Appellate Term. That the appellant, under the law, was required to interplead the absconding husband, and deposit the fund in the City Court under section 287 of the Civil Practice Act (infra p. 26) or retain it pursuant to the provisions of Section 113 of the Banking Law (infra p. 25), the Court is referred to the recent case of *Newhall* v. *Longacre Bank,* 248 N. Y. 252, 254, decided by the Court of Appeals on May 29, 1928.

The appellant in the instant case concededly owes the money on deposit to the absconded husband, and the plaintiff in the action, the Commissioner of Public Welfare, has, by the statute (infra p. 30) the right to possession thereof for the support and maintenance of the destitute wife and child, subject to defeasance by the County Court of the County of the Bronx if the fact of abandonment be not proven.

The lack of any *right* in the bank upon which it could lawfully base an attack upon the constitutionality of the statute, and its inability to show that it was "affected unfavorably" by the Warrant of Seizure (R. p. 18), and its duty under the law, requiring it to deposit the fund in Court and interplead the husband under Section 287 of the Civil Practice Act (infra p. 26) or interplead the husband and retain the fund as provided in Section 113 of the Banking Law (infra p. 25) and thereby relieve itself of any future possible litigation in regard thereto, justifies, in itself, and without consideration of any other matters discussed herein, the summary affirmance of the determination of the Court below. In this connection see also

Shaw v. *Board of Drainage,* 160 Ky. 422, at p. 432.

POINT IV.

For the reasons set forth in the opinion of the Court of Appeals of the State of New York, and in the prevailing opinion at the Appellate Term of the Supreme Court of the State of New York, and herein, the judgment and determination appealed from, should be affirmed with costs.

Respectfully submitted,

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J. JOSEPH LILLY,
MARTIN H. MURPHY,
of Counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CONTROVERSY

Neither constitutional nor statutory provisions are set forth at length in the following quotations, except where the provisions in their entirety have a bearing upon this case.

Constitution of the United States

14TH AMENDMENT

"* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of New York

ARTICLE I.

§6. * * * In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions, * * * nor be deprived of life, liberty, or property without due process of law; * * *.

ARTICLE VI.

§18. The legislature may establish * * * courts of domestic relations, as separate courts, or as parts of existing courts or courts hereafter to be created, and may confer upon them such jurisdiction as may be necessary * * * and to compel the support of a wife, child, or poor relative by persons legally chargeable therewith, who abandon or neglect to support any of them. * * * *.

ARTICLE VII.

§1. The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

ARTICLE XII.

§1. It shall be the duty of the legislature to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, * * * *.

ARTICLE XIII.

§1. * * * All officers, executive and judicial, * * * shall, before they enter on their duties of their respective offices, take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ---------- according to the best of my ability; * * *.

Banking Law

§2. The term "bank" when used in this chapter, * * * means any domestic moneyed corporation, * * * authorized to * * * receive deposits of money. * * *.

§106. In addition to the powers conferred by the general and stock corporation laws, every bank shall, * * * have the following powers:

1. To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; * * * by receiving deposits; * * *.

§113. 1. In all actions against any bank to recover for moneys on deposit therewith, if there be any person or persons, not parties to the action, who claim the same fund, the court in which the action is pending, may, on the petition of such bank, and upon eight days' notice to the plaintiff and such claimants, and without proof as to the merits of the claim, make an order amending the proceedings in the action by making such claimants parties defendant thereto; and the court shall thereupon proceed to determine the rights and interests of the several parties to the action in and to such funds.

The remedy provided in this section shall be in addition to and not exclusive of that provided in section eight hundred and twenty of the code of civil procedure.

2.The funds on deposit which are the subject of such an action may remain with such bank to the credit of the action until final judgment therein, and be entitled to the same interest as other deposits of the same class, and shall be paid by such bank in accordance with the final judgment of the court; or the deposit in controversy may be paid into court to await the final determination of the action, and when the deposit is so paid into court such bank shall be struck out as a party to the action, and its liability for such deposit shall cease.

3. The costs in all actions against a bank to recover deposits shall be in the discretion of the court, and may be charged upon the fund affected by the action.

Civil Practice Act

§6. The term "civil action" means any action except an action prosecuted in the name of the people of the state as plaintiffs against a party charged with crime.

§243. Each material allegation of the complaint not controverted by the answer, * * * must be taken as true for the purposes of the action. * * *

§260. The only pleading on the part of the defendand, is an answer.

§277. * * * An objection to a pleading in point of law may be taken by motion for judgment * * *.

§287. * * * A defendant against whom an action to recover upon a contract is pending at any time before answer upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him may apply to the court upon notice to that person and the adverse party for an order to substitute that person in his place and to discharge him from liability to either, on his paying into court the amount of the debt or delivering the possession of the property or its value to such person as the court directs; or, upon it appearing that the defendant disputes in whole or in part the liability as asserted against him by different claimants or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court, in its discretion, may make such order upon such terms as to costs and payments into court of the amount of the debt or part thereof or delivery of the possession of the property or its value or part thereof as may be just, and thereupon the entire controversy may be determined in the action.

§1163. The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff; and if that defense is established

to the satisfaction of the court, the defendant is entitled to judgment.

§1166. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

§1171a. Where in an action for divorce or separation, it appears to the court that the defendant is not within the state, or cannot be found therein, or is concealing himself therein, so that process cannot be personally served upon him, the court may at any time and from time to time make any order or orders without notice directing the sequestration of his property, both real and personal and whether tangible or intangible, within the state, and may appoint a receiver thereof, or by injunction or otherwise take the same into his possession and control. The property thus sequestrated and the income therefrom may be applied in whole or in part and from time to time, under the direction of the court and as justice may require, to the payment of such sum or sums as the court may deem it proper to award, by order or judgment as the case may be, and during the pendency of the action or at the termination thereof, for the education or maintenance of any of the children of a marriage, or for the support of the wife, or for her expenses in bringing and carrying on said action and the proceedings incidental thereto or connected therewith; and if the rents and profits of the real estate, together with the other property so sequestrated, be insufficient to pay the sums of money required, the court, upon such terms and conditions as it may prescribe, may direct the mortgage or sale of sufficient of said real estate to pay such sums. The court may appoint the wife receiver or sequestrator in such cases. The court may authorize the

wife to use and occupy, free of any liability for rent or use and occupation or otherwise, any house or other suitable property of her husband as a dwelling for herself or herself and her children, and may likewise turn over to her for the use of herself or herself and her children any chattel or chattels of her husband. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law.

Code of Criminal Procedure

§6. A criminal action is prosecuted in the name of the people of the State of New York, as plaintiffs, against the party charged with crime.

§7. The party prosecuted in a criminal action is designated in this Code as the defendant.

§39. The county courts embraced in this chapter have jurisdiction:

* * * * * *

9. To exercise the powers conferred by law in relation to the estates of persons absconding and leaving their families chargeable to the public.

§887. The following persons are vagrants:

1. A person who, not having visible means to maintain himself, lives without employment:

* * * * * *

5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms;

§899. The following are disorderly persons:

1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;

2. Persons who threaten to run away and leave their wives or children a burden upon the public;

§901. If the magistrate be satisfied, from the confession of the defendant, or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, to the following effect:

1. If he be a person described in the first or second subdivision of section eight hundred and ninety-nine, that he will pay to the county superintendent of the poor or to the overseer of the poor of the town, city or village, or to a society for the prevention of cruelty to children, weekly for the space of one year thereafter a reasonable sum of money to be specified by the magistrate for the support of his wife or children.

§914. The father, mother and children, if of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepit so as to be unable by work to maintain himself, must, at their own charge, relieve and maintain in a manner to be approved by the overseers of the poor of the town where he is, or in the city of New York, by the Commissioners of public charities.

§921. (a) When the father, or the mother, absconds from the children, or a husband from his wife, or a wife from her husband, leaving any of them chargeable or likely to become chargeable upon the public, the officers

mentioned in section nine hundred and fourteen may apply to any two justices of the peace or police justices in the county in which any real or personal property of the father, mother, husband or wife is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officer so applying to take and seize the property of the person so absconding. * * * *.

§922. The officer so applying may seize and take the property, wherever it may be found in the same county; and are vested with all the rights and title thereto which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after the issuing of the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the county where they reside, there to be filed.

§923. The court, upon inquiring into the circumstances of the case, may confirm or discharge the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied towards the maintenance of the children or spouse of the person absconding.

§924. If the party against whom the warrant issued, return and support the spouse or children so abandoned, or give security satisfactory to any two justices of the peace, or police justices in the city, village or town, to the overseers of the poor of the town, or in the city of

New York, to the commissioners of charities and corrections, that the spouse or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

§925. The officers must sell at public auction the property ordered to be sold and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statutes. They must also account to the county court of the county for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time.

§926. When the poor person for whom relief is sought is a charge upon a county, the superintendent of the poor are vested with the same powers, as are given by this title to the overseers of the poor of a town, in respect to compelling relatives to maintain poor persons, and abandoning his family; and are entitled to the same remedies in their names, and must perform the duties required by this title, of overseers, and are subject to the same obligations and control.

Greater New York Charter

§103. The head of the department of public welfare shall be called the commissioner of public welfare.

§657. The department of public charities shall be known as the department of public welfare and wherever in this charter or in any general or special statute where the term department of public charities shall be used it shall be deemed to mean department of public welfare.

§658. The head of the department of public charities shall be called the commissioner of public charities * * *.

§659. * * * The commissioner shall have power to appoint and in his discretion to remove not more than three deputies * * *.

The commissioner may, also, in writing delegate any portion of his powers, or duties, to a deputy commissioner designated by him, to be exercised by such deputy commissioner for such time, and to such extent, as shall be specified in such written delegation * * * *.

§662. The commissioner of public charities shall have all the authority concerning the care, custody and disposition of * * * destitute persons heretofore conferred upon the board of public charities and upon the several commissioners of public charities * * *. The commissioner shall be the overseer of the poor of The City of New York, as constituted by this act. * * * The commissioner shall make provision for the temporary care of vagrant and indigent persons, and shall provide for an investigation into the circumstances of all such persons, and shall cause every person who is found upon investigation to be a vagrant, to be brought before a magistrate pursuant to law * * *.

§664. The commissioner or deputy commissioner of public charities shall have power to commit, to indenture, place out, discharge, or transfer any child who may be in his custody, or who may have been placed by him in an institution as a public charge, * * *.

§665. Whenever any child, actually or apparently, under the age of sixteen years, is brought before any court or magistrate in The City of New York, as constituted by this act, pursuant to section eight hundred and eighty-eight of the code of criminal procedure, or is found destitute of means of support the magistrate presiding, or court before whom or which such child is brought shall thereupon fix a day more than five days distant for the hearing and final disposition of the charge against said child, and shall, at the same time, in addition to such other notices as may be required by law, give notice, in writing, of such arrest to the commissioner of public charities and to the Society for the Prevention of Cruelty to Children duly authorized to carry on its work in the county in which said arrest is made, which notice shall state the name of the child, its age, either actual or apparent, its sex, color, birthplace, residence, father's name, mother's name, parents' religion and parents' occupation, each if known; the specific charge upon which the arrest is made; the name of the officer making the arrest, and the name and address of the complaining witness, if any there be. Any such court or magistrate may temporarily commit such child to the custody and care of an institution to which said court or magistrate is authorized by law to make final commitment.

§666. The commissioner may appear either by clerk or by counsel on all hearings or proceedings for the commitment of children. He shall investigate the circumstances of their relatives, whose duty it is to relieve and maintain them, and shall on or before the final hearing therein, file with the Court or Magistrate a statement in writing of such fact or facts as in the opinion of the commissioner render it proper or improper

that such child should be supported as a public charge at the expense of the city; and such written statement of fact or facts when so filed shall be preserved with and form a part of the record of the proceedings instituted by the arrest of such child. Omission or failure to file such statement shall not be ground for delaying the final decision.

§683. The parents, grandparents, children and grandchildren, and husband or wife, of sufficient ability, of a poor person who is insane, blind, old, lame, sick, impotent or decrepit so as to be unable to work to maintain himself, and the parents and grandparents of a destitute child must at their own charge support him in a manner sufficient to prevent him from being, or to avoid the liability of his becoming, a charge upon the public.

If the relative of a poor person of sufficient ability fails to support him as in this section provided and the person is being cared for or is about to be cared for by the commissioner of public welfare of the city of New York, the commissioner of public welfare of such city by whom and in whose name the proceedings shall be conducted may apply to a city magistrate as provided by section seventy-four of chapter six hundred and fifty-nine of the laws of nineteen hundred and ten or to any court of record having jurisdiction of the defendant for an order to compel him to pay the reasonable charges determined by the commissioner of public welfare of the city of New York for the care of such relative during his stay in the public or private institution, or home where the commissioner of public welfare has placed him, and the proceedings to be taken to make such order and to enforce the same shall in all respects be similar to those provided in the code of

criminal procedure. The determination of the commissioner of public welfare as to the reasonableness of said charges may at any time be reviewed by any city magistrate or any judge of a court of record.

Evidence that the poor person mentioned in this section is without adequate means of support shall be presumptive proof of his liability to become a public charge. The relative against whom proceedings are begun for the support of a poor person shall be taken to be of sufficient ability to contribute to the support, unless the contrary shall affirmatively appear to the satisfaction of the court or a judge thereof.

* * * * * *

§1526. There shall be published daily, sundays and legal holidays excepted, under a contract to be made as hereinafter provided, a paper to be known as the City Record* * * *.

§1528. All printing for said city and for the counties contained within its territorial limits, including the printing of the City Record, shall be executed and all stationery shall be supplied, under contracts, to be entered into by the said board of the city record. * * * The said person appointed to supervise the publication of the City Record * * *, shall also cause to be printed in each issue of said City Record a separate statement of the hours during which all public offices in the city are open for business, and at which each court regularly opens and adjourns, as well as of the places where such offices are kept and such courts are held * * * *.

Inferior Criminal Courts Act of The City of New York

§72. The chief city magistrate and the city magistrates of the city of New York are magistrates within

the meaning of the provisions of the code of criminal procedure and the penal law, and the city magistrates' courts are police courts within the meaning of the provisions of the code of criminal procedure and the penal law. The chief city magistrate and the city magistrates have all the powers and jurisdiction possessed by city magistrates of the city of New York on the first day of April, nineteen hundred and ten. Each of said magistrates shall have jurisdiction throughout the city, and may perform any and all of the duties and functions of a magistrate in and for any one of the counties in said city; * * * *.

§74. a. On or after the first day of July, nineteen hundred and nineteen, there shall be held every day in the year, except Sundays and holidays, in the boroughs of Manhattan, the Bronx and Brooklyn, respectively, and in the other Boroughs of the City when the board of city magistrates so directs, a city magistrates' court which shall be designated the domestic relations court, to which shall be taken or transferred for arraignment, examination or trial, or to which shall be summoned, all persons described as disorderly in subdivision one of section eight hundred and ninety-nine of the code of criminal procedure, all persons compelled by law to support poor relatives, as provided by title eight of part six of the code of criminal procedure and all persons charged with abandonment or non-support of wives, children or poor relatives under any provision of law, conferring upon magistrates summary jurisdiction or authority to hold for trial in another court. The domestic relations court shall have the sole and exclusive jurisdiction to initiate, investigate, try, hear and determine all proceedings and charges against any such persons alleged to be disorderly persons under this section. The following persons are

declared to be disorderly persons: Every person in the city of New York who

Actually abandons his wife or children without adequate support; or

Leaves them in danger of becoming a burden upon the public; or

Who neglects to provide for them according to his means; or who threatens to leave his wife or children without adequate support, or in danger of becoming a burden upon the public; or

Who shall have abandoned his wife or children in any other place and is found in the city of New York, when his wife or children are residents thereof and without adequate support, or in danger of becoming a burden upon the public; or

Who, by reason of his conduct, or of his cruel or inhuman treatment, or by reason of his neglect or refusal to provide his wife or children with the necessaries of life, renders it unsafe, improper or impossible for them to live with him, by reason of which they are without adequate support or in danger of becoming a burden upon the public; or

Who fails to support his wife or children when his wife has secured a decree of separation by reason of which they are without adequate support or in danger of becoming a burden upon the public; or the

Parents, grandparents, children and grandchildren of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, and the parents and grandparents of a destitute child, who at their own charge shall fail to support him in a manner sufficient to prevent him from being, or to avoid the liability of his becoming a charge upon the public.

b. Upon a complaint made under oath to him, against the person as being disorderly, a city magistrate presiding in a domestic relations court, in a borough in which such court is held, and in other boroughs of the city of New York, a city magistrate presiding in any city magistrates' court therein, may issue a warrant for the arrest of the defendant, or, in his discretion a summons in substance in the form provided by section eighty-two of this act. Upon his arrest or appearance the defendant shall be arraigned in the manner provided by law. All proceedings against disorderly persons shall be brought in the name of the city of New York as complainant.

c. Service of warrants. Service of warrants, summonses and all process issued from said court, or any magistrate presiding therein, may be made at any time, when so ordered by the magistrate issuing the same, or presiding therein.

Whenever a warrant is issued for the arrest of a defendant and the whereabouts of the defendant is unknown, the clerk of the said court may issue a certificate evidencing the issuance thereof to the complainant, upon which, any police officer, shall arrest the person named in said certificate as under a warrant. The clerk of the said court is empowered to take affidavits and acknowledgements of the undertaking and all abandonment and nonsupport or other cases, in said court, and subpoenas and summonses issued by the said court shall be signed by the clerk of the said court, or such assistant clerk as may from time to time be designated by the chief city magistrate. If, for any reason, the person charged cannot be arraigned before the magistrate presiding in said domestic relations court, then said arraignment may be made before the most accessible magistrate,

and the production of the warrant directing the arrest of said person aforesaid before the said magistrate shall be presumptive evidence to said magistrate of the filing of a proper information for the issuance of said warrant, and said magistrate shall thereupon admit to, fix and accept bail, or parole the defendant for trial before the said domestic relations court; and in default of giving such bail, or in case said defendant is not paroled, the said magistrate shall hold the said defendant for examination before the magistrate presiding in said domestic relations court respectively and all subsequent proceedings in said proceeding shall be had before the magistrate presiding in said domestic relations court. If upon examination of said defendant, it shall appear by the confession of the defendant, or by competent testimony, that he is a disorderly person, the said magistrate shall make an order specifying a fair and reasonable sum of money according to his financial ability, to be paid weekly or otherwise by said defendant to the court unless otherwise ordered for the support of his wife, children, parent, grandparent, grandchildren or poor relative, as the case may be, and may require him to give security by a written undertaking to the city of New York, with sufficient surety approved by the magistrate to that effect, or in lieu thereof may deposit with the clerk of the said court in cash or liberty bonds. Upon the consent of the defendant the magistrate may without convicting the defendant of being a disorderly person make an order herein which shall be enforceable in all respects as under an order made after conviction. Said magistrate shall have full power and authority to administer an oath to said principal and surety in such undertaking as to the truth of the statements therein and any justification of the statement attached thereto or accompanying the same with full power and authority to take acknowledgment

thereto of any of the parties to the same with like power and effect as if sworn to and acknowledged before a notary public in any county wherein the same may be taken or acknowledged. Any magistrate of the city of New York shall have power to take the security aforesaid with like power and authority as if he made the order aforesaid. The wife, children, parent, grandparents, grandchildren or poor person aforesaid, is hereby declared to be a primary beneficiary of the order, and evidence that they are without means shall be presumptive proof of their liability to become a charge upon the public; and the person against whom proceedings are begun as a disorderly person shall be taken to be of sufficient financial ability to contribute to the support of the wife, children, parent, grandparents, grandchildren, or poor person as the case may be unless the contrary shall affirmatively appear to the satisfaction of the court or judge thereof. Upon the trial of all complaints herein the wife shall be a competent witness against her husband as to all matters embraced in said complaint. If the undertaking be given or cash or liberty bonds be deposited, the defendant must be discharged; but if not, the magistrate must convict him as a disorderly person and must make up and sign with his title of office and file in the office of the clerk of the county in which such conviction is had, a record of the conviction of such offender as a disorderly person, specifying generally the nature and circumstances of the offence and the name of the witnesses by whom it has been established, and shall by a warrant of commitment signed by him with his title of office commit the defendant to the workhouse of the city of New York; or to the board of inebriety of the city of New York; or to such other officer, board or person as shall take over the duties of said board of in-

ebriety, or to the city prison or jail in the borough where the conviction is had pending his transportation to the workhouse or to the custody of the board of inebriety of the city of New York; or such other officer, board or person such as shall take over the duties of said board of inebriety, if necessary, for such term as the magistrate may deem proper, not exceeding one year, until he give the security prescribed by the order or judgment of conviction or be discharged according to law. But such term of imprisonment shall not preclude the magistrate from recommitting the defendant for any subsequent violation of the order. The board of inebriety of the city of New York, or such officer, board or person, such as shall take over the duties of said board, is hereby authorized to receive all persons committed as aforesaid. The magistrate may, in his discretion, place any defendant adjudged guilty by him on probation in accordance with the provision of this act so far as the same can be applied, or in pursuance of the code of criminal procedure. Further, upon the consent of the defendant, the magistrate may, before conviction, place the defendant under probationary oversight on the same terms and conditions as on probation for such term as the magistrate may deem advisable, and adjourn the proceeding from time to time; or he may take from the defendant an undertaking to the city of New York for said period, with or without security, in a sum fixed by said magistrate. The condition of said undertaking shall be such as said magistrate may direct, and if complied with said obligation shall be void; otherwise, to remain in full force and effect. The magistrate making the order or judgment of conviction, or the magistrate sitting in the court where the order was made, may at any time thereafter, upon due notice to the parties, either upon their consent or for good cause shown, vacate or modify

the order by increasing or decreasing the terms thereof, and may, if the defendant be imprisoned, either discharge the defendant absolutely from imprisonment or place him upon probation; or if the defendant be not imprisoned, may cancel any undertaking given therein. Upon arraignment the defendant may be paroled by the magistrate presiding for his appearance for trial, or the said defendant may be admitted to bail for his appearance at said trial in such amount as said magistrate may deem proper. If the defendant be admitted to bail for his future appearance as aforesaid, the condition of the undertaking shall be for the future appearance of the defendant according to the terms thereof or in default thereof the surety will pay to the clerk of the domestic relations court aforesaid a specified sum, which sum shall be therein set forth. Intsead of entering into such an undertaking a defendant may deposit in lieu thereof cash or liberty bonds in an amount to be fixed by said magistrate with the clerk of the domestic relations court, or such assistant clerk thereof as may be designated for that purpose by the chief city magistrate. Any magistrate of the city of New York shall have the power to admit to, fix and accept bail. If such bail be accepted by him he shall cause the same to be transmitted to the clerk of the domestic relations court from which the warrant was issued within twenty-four hours from such acceptance of said bail. If such defendant be arraigned before such magistrate he shall have power to parole said defendant. If the defendant fails to appear when paroled, or in accordance with the terms of said undertaking, or the terms upon which the money or liberty bonds was deposited, the magistrate presiding in the domestic relations court shall enter the fact of such non-appearance upon the minutes of the undertaking for his appearance or the money or liberty bonds deposited in

lieu thereof shall, in the discretion of the magistrate, thereupon be forfeited subject to the right of the magistrate presiding in the domestic relations court to remit the forfeiture.

The magistrate shall also have power to issue a warrant for the rearrest of defendant. In case of forfeiture of cash bail, or liberty bonds, and no order to remit the same as aforesaid is made, the same shall be applied by the clerk of the court of domestic relations for the benefit of the wife, child, children, grandchild or children, parent, grandparent or poor relative of the defendant, as the case may be, in such proportion and in such manner as the magistrate presiding in domestic relations court shall direct.

Every action brought upon any undertaking given in an abandonment proceeding against a disorderly person shall be brought in the name of the city of New York, and in such action it shall not be necessary to prove the actual payment of money to the beneficiary; but the neglect to pay the sum ordered to be paid shall be a breach of the undertaking, and the measure of damages shall be the sum ordered to be paid and withheld at the time of the commencement of the action with interest thereon. After the recovery of damages or the commencement of the action, another action may be brought for a breach of the undertaking. All monies recovered in any action shall be paid to the clerk of the domestic relations court, in which the proceeding is had, to be by him expended for the support of the wife, child, children, grandchildren, parent, grandparent or poor relative, as the case may be, of the person against whom the order herein has been made; provided, however, that a surety on an undertaking given as aforesaid to secure the support of said wife, child, children, grandchildren, parent, grandparent or poor relative heretofore named may at any time surrender the

defendant to the magistrate presiding in the court where the order was made, who shall hold him as provided in said order, and thereupon said surety shall be relieved of any damages upon the undertaking except the sum to be paid and which was withheld at the time of surrender, with interest; provided further, that said magistrate presiding shall not be compelled to except such surrender unless the amount due by the defendant at the time of the surrender is paid to the court.

Upon the forfeiture of an undertaking given in a proceeding against a disorderly person as provided in this section, the corporation counsel of the city of New York shall cause to be filed in the office of the clerk of the respective counties of the city of New York in which said undertaking may have been taken, said undertaking together with a certified copy of the order of the court forfeiting the same, and thereupon the said Clerk shall docket the same in the book kept by him for the docketing of judgments, transcripts whereof are filed with him as such clerk, as if the same was a transcript of a judgment directed for the amount of the penalty, and the undertaking and a certified copy of the order forfeiting the same shall be the judgment record; such judgment shall be a lien on the real estate of the persons entering into such undertaking, from the time of filing said undertaking and a copy of the order and docketing the same, as in this section directed; an execution may be issued to collect the amuont of said undertaking in the same form as upon a judgment, recovered in any court of record in said counties, respectively. The amount recovered on said undertaking and judgment aforesaid shall be applied and expended for the support of the wife and children, grandchildren, parent, grandparent or poor person, as the case may be, of the person charged with the offenses hereinbefore recited, by said

clerk aforesaid under direction of said magistrate presiding, and when any money has been deposited as bail with any other person than said clerk aforesaid and which shall have been forfeited as hereinbefore provided, said money shall be paid to the clerk of the domestic relations court aforesaid by the person with whom said sum of money is deposited, upon presenting to him a certificate from the city magistrate who made the order of forfeiture certifying to the forfeiture thereof, or the magistrate presiding with said domestic relations court, which said certificate shall state the name of the person making the deposit, when it is made, the name of the defendant, and that the sum of money was forfeited on account of the defendant's failure to appear as directed and shall be signed by the said magistrate.

d. Appeals in disorderly persons proceedings. An appeal from an order, decision or judgment under this section may be taken either by a defendant or by the complainant to the court of special sessions as provided by section ninety-four, except that the court allowing the appeal on behalf of the defendant must take from the defendant a written undertaking to the city of New York in such sum and with such sureties as he may approve, or in lieu thereof a deposit of cash or liberty bonds, that the defendant will abide the judgment of the appellate court upon the appeal, and except that all notices required by law to be served upon the district attorney upon an appeal shall upon such appeal be served upon the corporation counsel of the city of New York. If the defendant has given an undertaking to comply with the order of the domestic relation court or has deposited cash or liberty bonds in lieu thereof no undertaking on appeal shall be required. No appeal taken by defendant under this section shall operate as a stay of proceedings and no stay herein shalll be granted.

If a new trial be ordered it must be had in the court from which the appeal was taken. When the appeal is taken by the complainant the affidavit for the allowance of the appeal shall be made by, and all other proceedings shall be taken by the corporation counsel.

If the judgment on the appeal be against the complainant the complainant may appeal therefrom to the appellate division of the supreme court in the same manner as the defendant. (Subd. d., amended by L. 1922, Ch. 595, in effect July 1, 1922.)

e. When new security may be required after an order in disorderly persons proceedings. After an undertaking has been given by the defendant in a disorderly persons proceedings as herein provided upon proof by affidavit that diligent efforts have been made to serve personally upon the surety upon such undertaking a summons in an action brought thereon for a default in the terms thereof, but that such service upon such surety cannot be affected or that a recovery cannot be had thereon; or that the judgment obtained upon such undertaking remains wholly unsatisfied and unpaid; or that a surety has been adjudged a bankrupt; or upon the decease of such surety, the city magistrate sitting in the court where the final order was made may issue a warrant for the arrest of the defendant in whose behalf the undertaking was given, and require him to give new security, or in default thereon may commit him under the original order in the manner herein prescribed.

* * * * * *

Judiciary Law

§190. The county judge must, from time to time, appoint the times and places for holding the terms of his court * * * *.

§191. Each term must be held at the place designated by statute for that purpose, * * * *.

§192. Each appointment made as prescribed in sections one hundred and ninety and one hundred and ninety-one of this chapter, must be filed in the county clerk's office, and a copy thereof published at least once in each week for three successive weeks before a term is held * * * by virtue thereof, in the newspapers in the City of Albany, designated pursuant to Section eighty-two of the executive law and also in at least one newspaper published in the county, and as many additional newspapers, published therein, as the county judge prescribes.

Penal Law

§481. A parent, or other person having the care or custody, for nurture or education, of a child under the age of fourteen years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment in a state prison for not more than seven years.

§482. A person who:

1. Wilfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor, or to make such payment toward its maintenance as may have been required by the order of a court or magistrate when such minor has been committed to an institution; * * *.

Poor Law

§2. "A poor person" is one unable to maintain himself, * * *.

§130. Whenever the father * * * has absconded or shall abscond from his or her children, or a husband from his wife, * * * leaving any of such children or such wife chargeable, or likely to become chargeable upon the public for their support, and any real or personal estate of such father, or * * * husband, has been or shall be seized by a superintendent of the poor or an overseer of the poor, or by a board of charities, or by other officers authorized to make such seizure, by warrant of the justices of the peace of the county where such real or personal property may be situated, and the * * * county court of the county wherein such superintendent or overseer of the poor, or board of charities, or other officers authorized to make such seizure resides, or other court having jurisdiction thereof, has confirmed, or shall confirm said warrant and seizure, and has heretofore directed or shall hereafter direct what part if any of said personal property shall be sold, and how much if any of the proceeds of such sale and of the rents and profits of the real estate, if any, be applied toward the maintenance of the children or wife or husband of the person so absconding; then the said superintendent or overseer of the poor, board of charities or other officers so authorized and directed, shall apply the said proceeds of sale of said personal property, or rents and profits of the real estate as the case may be, first, to the payment of such taxes and assessments as may be outstanding and existing liens upon the said real estate, and repairs necessary to be made upon said real estate, and premiums for insurance on the buildings on said real estate; and the balance, if any, directly to the maintaining, bringing up and providing for the wife, husband, child or children so left and abandoned, as the same be required from time to time; and for all such ex-

penditures they shall take proper vouchers and from the rents and profits thereafter received from any real estate so seized they shall first pay all legal taxes and assessments, as they shall be assessed against said real estate, and such premiums for insurances and expenses for such repairs thereon as they may deem necessary for the protection and preservation of said real estate, and the balance of said rents and profits shall be applied by said overseers, superintendents, boards of charities, or other persons authorized to make such seizures, to the maintaining, bringing up, and providing for the wife, husband, child or children so left and abandoned, and proper vouchers shall be taken thereof.